

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MATTHEW HOUSTON KERWIN,
Petitioner.

No. 2 CA-CR 2015-0454-PR
Filed January 28, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2010113360001DT
The Honorable Lisa Daniel Flores, Judge

**REVIEW GRANTED, RELIEF GRANTED IN PART AND
DENIED IN PART**

Matthew Kerwin, Phoenix
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Matthew Kerwin petitions for review of the trial court's order summarily dismissing his untimely, successive notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and denying his motions related to that proceeding, as well as the court's denial of his motion to reconsider that order. For the following reasons, we grant review and deny relief from the court's dismissal of the notice and its denial of reconsideration. We grant relief in part, however, with respect to the denial of Kerwin's motion requesting a copy of his notice and its attachments, and we remand the case for reconsideration of that ruling.

¶2 Pursuant to a plea agreement, Kerwin was convicted in 2010 of attempted aggravated assault, found to have one historical prior felony conviction, and sentenced to a six-year term of imprisonment. Kerwin filed his first, untimely notice of post-conviction relief in April 2012. The trial court found he had stated a colorable claim that his delay in filing should be excused pursuant to Rule 32.1(f), and appointed counsel later notified the court that he could find no claim to raise in Rule 32 proceedings. Kerwin then filed a pro se petition for post-conviction relief, in which he alleged counsel had been ineffective in failing to seek an evaluation of Kerwin's competency pursuant to Rule 11, Ariz. R. Crim. P., and in failing to present evidence of his serious mental illness (SMI) as a mitigating circumstance at sentencing. The trial court summarily denied relief, and Kerwin did not seek review of that ruling.

¶3 In January 2014, Kerwin filed an untimely, successive notice of post-conviction relief in propria persona. On the notice form, he checked boxes to indicate he was asserting claims that (1)

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he received ineffective assistance of counsel; (2) he “is being held in custody after the sentence imposed has expired,” *see* Ariz. R. Crim. P. 32.1(d); (3) “[n]ewly discovered material facts exist which probably would have changed the verdict or sentence,” *see* Ariz. R. Crim. P. 32.1(e); and (4) his “failure to file a timely notice of post-conviction relief [of right] . . . was without fault on [his] part,” *see* Ariz. R. Crim. P. 32.1(f). In response to the notice form’s direction that he “[s]tate the facts that support the claim[s] and the reasons for not raising the claim[s] in the previous petition or in a timely manner,” *see* Ariz. R. Crim. P. 32.2(b), he asserted the following: (1) trial counsel had been ineffective in failing to seek a competency examination before Kerwin pleaded guilty, failing to “raise issues of Rule 11 guilty except insane,” failing to advise him of an “early disposition plea offer,” and failing to challenge an allegedly illegal sentence enhancement authorized by his plea agreement;¹ (2) he was being held in custody after his sentence had expired “because the prior felony alleged was unlawfully used” to enhance the sentence imposed by the court; and (3) acknowledgement by the Arizona Department of Corrections (ADOC) that he suffers from “serious mental illness” constitutes “[n]ewly discovered material facts which probably would have changed” his conviction or sentence. In addition, Kerwin asserted claims of judicial error or bias and prosecutorial misconduct. He also filed, contemporaneously, motions asking the court “to suspend the rule to make legal copies” and “for sanctions” against an ADOC paralegal for her alleged refusal to approve his request, as an indigent inmate, for a copy of the 129 pages of exhibits he attached to his notice.

¶4 The trial court dismissed the untimely notice of post-conviction relief, finding most of Kerwin’s claims time-barred by Rule 32.4(a), which provides that “[a]ny notice not timely filed may

¹Kerwin also alleged trial counsel had been ineffective in failing to file a timely of-right notice of post-conviction relief “after [he] was sentenced,” apparently referring to Rule 32.1(f). Although Rule 32.1(f) provides a ground to excuse an untimely notice in a defendant’s first Rule 32 proceeding, it has no relevance to a successive Rule 32 proceeding.

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only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).” The court further found that, although the rule permits a defendant to raise, in an untimely proceeding, a claim under Rule 32.1(d) that he has been imprisoned beyond the sentence imposed, or a claim under Rule 32.1(e), of newly discovered facts that probably would have changed his conviction or sentence, Kerwin failed to identify facts that would support either such claim. In the same order, the court denied Kerwin’s motion for sanctions, stating it lacked authority “to determine inmate access or whether resources are appropriate” and noting, “These are matters for the Director of the [ADOC], who is not a party to this criminal case.” In denying as moot Kerwin’s “Motion for the Suspension of the Rules,” the court stated Kerwin’s claims “failed for reasons unrelated” to an inability “to attach copies of all documents he wanted to include with his Notice of Post-Conviction Relief.” Kerwin filed a motion for reconsideration, which the court denied, and this petition for review followed.

¶5 In it, Kerwin argues that (1) an ADOC paralegal violated his constitutional rights by denying his request for copies of “his Rule 32 petition”; (2) the trial court abused its discretion in denying his request for “a copy of his Rule 32 petition and exhibits”; (3) the court abused its discretion in “fail[ing] to consider[] newly discovered evidence” related to his “serious mental illness,” and he was entitled to an evidentiary hearing on that claim; and (4) the court abused its discretion at sentencing by imposing an enhanced, aggravated sentence. We review a court’s dismissal of a notice of post-conviction relief for an abuse of discretion. *State v. Harden*, 228 Ariz. 131, ¶ 3, 263 P.3d 680, 681 (App. 2011). We find none here.

¶6 The trial court correctly found most of Kerwin’s claims time-barred pursuant to Rule 32.4(a), including his claims of ineffective assistance of counsel, prosecutorial misconduct, and sentencing error. With respect to Kerwin’s assertion, under Rule 32.1(e), of newly discovered material facts that might have changed his conviction or sentence, Rule 32.2(b), Ariz. R. Crim. P., provides, in relevant part,

When a claim under Rules 32.1(d), (e), (f),
(g) and (h) is to be raised in a successive or

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untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

Although Kerwin maintains his “Serious Mental Illness status was newly discovered . . . in December 2013,” when, he asserts, it was first recognized by ADOC, we note that he argued, in his August 2012 petition for post-conviction relief, that counsel had been ineffective in failing to call “witnesses from the Social Security Office Psychiatry department . . . [who] would ha[ve] testified that he was deemed SMI.” The court did not abuse its discretion in concluding Kerwin’s current notice failed to set forth meritorious reasons substantiating a claim under Rule 32.1(e). *See* Ariz. R. Crim. P. 32.1(e)(3) (excluding “merely cumulative” facts as basis for relief).

¶7 Nor did the trial court abuse its discretion in denying Kerwin’s request for sanctions against an ADOC employee, for the reasons expressed in its order. We are concerned, however, that the court may have misunderstood Kerwin’s “Motion for the Suspension of the Rules.” In that motion, Kerwin was not seeking leave to file exhibits in addition to the 129 pages filed with his notice, as the court’s order suggests, but was requesting a copy of his filing, which had included his only copies of those exhibits. Kerwin seems to have been confused about the distinction between a notice of post-conviction relief, which is submitted on a court-approved form and ordinarily would not require exhibits, *see* Ariz. R. Crim. P. 32.4(a), and a subsequent petition for post-conviction relief, to which a defendant is required to attach “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition,” Ariz. R. Crim. P. 32.5. Here, Kerwin filed a notice, not a petition, but he attached the

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documents he apparently believed were required, by Rule 32.5, for a petition.

¶8 We note that Rule 32.4 specifically provides that, upon receipt of a post-conviction relief notice, a trial court “shall . . . promptly send [a] cop[y]” of the notice to the defendant and others, but it does not specify whether a copy of “the notice” would encompass the lengthy exhibits filed here. The trial court’s order did not address Kerwin’s request for a copy of the exhibits he filed with his notice, and we conclude the matter is best addressed by that court. Accordingly we remand the case for the limited purpose of reconsidering Kerwin’s “Motion for the Suspension of the Rules” and direct the court to determine whether to grant Kerwin’s request for a copy of his notice and attached exhibits.²

¶9 We grant review. Kerwin has failed to establish the trial court abused its discretion in summarily dismissing his untimely and successive notice of post-conviction relief, in denying his motion for sanctions against an ADOC employee, or in denying his motion for reconsideration, and we deny relief as to those issues. Because the trial court does not appear to have addressed the issue raised in Kerwin’s motion captioned “Motion for the Suspension of the Rules,” we remand the case for the limited purpose of reconsideration of that motion, as set forth above.

²The trial court might also consider, as alternative relief, whether Kerwin’s complete filing could be returned to him after it is otherwise subject to destruction pursuant to Rule 28.1, Ariz. R. Crim. P.